

Floor Seal v. Sinak Corporation, 04-55090/04-55572

DEC 01 2005

KLEINFELD, Circuit Judge, concurring in part and dissenting in part:

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

I concur in Parts 2 and 3 of the majority disposition but respectfully dissent from Part 1.

The consideration paragraph of the settlement agreement provides for both legal and illegal consideration. The illegal consideration is that each party shall refrain from tortious acts. But that provision can be severed under California Civil Code § 1599, leaving legal consideration. First, each party agreed to dismiss the action with prejudice. That is, by itself, good consideration because it confers a legal benefit that neither party owed the other before they entered into the settlement agreement. Second, each party agreed to “freely and fairly compete in an atmosphere which is to be undisturbed by any wrongful activity and each shall endeavor in good faith to prevent such acts from occurring.” It is hard to make anything concrete of the “atmosphere” promise, but there is something concrete that goes beyond either party’s legal duties in the “endeavor in good faith to prevent” wrongful activity promise. While parties have a legal duty to refrain from wrongful activity, and the promise to do so is not good consideration, a promise to take active measures to prevent wrongful activity is.

In accord with the above discussion, and the liberal allowance for amendments given by Federal Rule of Civil Procedure 15, Floor Seal should have been given an opportunity to amend its complaint.